Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents and Amici National Association of Criminal Defense Lawyers, et al. (NACDL) agree that the issues raised by the petitions in this case are of seminal importance and warrant this Court's review. Booker Br. in Response (Br.) 3-5; Fanfan Br. in Opp. 4; NACDL Amici Br. 2. There can be no doubt that this Court's prompt action is warranted. Even though little more than a month has passed since this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531

(2004), the courts of appeals are already divided on both of the questions presented by the petitions, and that division has deepened since the filing of the petitions in these cases. Scores of district courts have issued opinions on the implications of *Blakely* for the Sentencing Guidelines and for sentencing in the federal system. The fragmentation of the law on the most basic questions in federal sentencing presents a compelling case for guidance from this Court, in order to stem a flood tide of contradictory approaches applied in thousands of sentencings—many of which may have to be redone once this Court settles the applicable law. The emerging "crisis in the administration of criminal justice in the federal courts" that the en banc Second Circuit predicted in its order certifying questions to this Court (*United States* v. *Penaranda*, 2004 WL 1551369, *7 (July 12, 2004), certification docketed, No. 04-59 (July 13, 2004), is a reality. There is no issue in the federal courts today that more urgently requires this Court's immediate attention.

Respondents and their amici, however, urge this Court to reframe the questions presented in the government's petitions, grant review in different cases than the government has proposed (or grant review in at most one of those cases), and set a more relaxed schedule for briefing and argument than proposed by the government. Those suggestions should be rejected. The Court should grant both of the petitions in these cases and calendar them for expedited briefing and argument.

A. The Court Should Grant Review On The Questions As Formulated By The Petitions

All three of the briefs filed by respondents and their amici reformulate the questions presented, and the NACDL suggests that this Court do likewise "to make

them clearer and to ensure that the lower courts receive guidance on the core issues they now confront." NACDL Amici Br. 2. None of the purported reasons for altering the questions presented in the petitions justifies that unusual action.

1. The government's first question presented squarely and plainly raises the issue of whether *Blakely* applies to the Guidelines. It asks:

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

The NACDL first suggests (Amici Br. 3-4) that the question is "underinclusive" because it refers only to the Sixth Amendment, and not to the Due Process right to proof beyond a reasonable doubt and to the Fifth Amendment right to a Grand Jury indictment. *Blakely* itself, however, was expressly decided under the Sixth Amendment jury trial guarantee. 124 S. Ct. at 2534 ("We consider whether [Blakely's sentence] violated petitioner's Sixth Amendment right to trial by jury."); *id.* at 2538 ("Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid."). The question presented is therefore responsive to *Blakely*'s actual holding. Nevertheless, the Court's decisions make abundantly clear that the right to jury trial is interlinked with the requirement of proof beyond a reasonable doubt and, in the federal system, with the right to a grand jury indictment. *Blakely* itself noted the connection to the

requirement of proof beyond a reasonable doubt.[1] Other decisions of this Court make manifest that, in a federal case, the grand jury right goes hand-in-hand with the rights identified in *Apprendi*.[2] There is no need to broaden the question presented here in order to obtain resolution of those issues.

NACDL also faults (Amici Br. 4) the question presented for using the phrase "enhanced sentence" to refer to a Guidelines sentence that is increased based on a fact "not found by the jury or admitted by the defendant." *Booker* Pet. I; *Fanfan* Pet. I. There is nothing mysterious about that phrase. It embraces, with simplicity and clarity, *all* of the types of Guidelines

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[1] The Court's analysis began by stating that it was applying "the rule we expressed in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000): 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*.'" 124 S. Ct. at 2536 (emphasis added) (quoting *Apprendi*, 520 U.S. at 490); see *id.* at 2542 ("Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt.").

[2] See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (stating, after quoting the rule expressed in *Apprendi*, that "[i]n federal prosecutions, such facts must also be charged in the indictment"); *Harris* v. *United States*, 536 U.S. 545, 549, 568 (2002) (considering whether the *Apprendi* rule applies to facts that raise the mandatory minimum within the otherwise-authorized range of punishment, in a case where the defendant waived the right to jury trial but contended that reliance on the minimum-enhancing fact violated his rights to a grand jury indictment and proof beyond a reasonable doubt); *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999) (proposing the rule later adopted in *Apprendi* as "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

factors that result in a sentence above the maximum that is justified "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Blakely*, 124 S. Ct. at 2537—whether those factors are denominated under the Guidelines as "offense characteristics," "adjustments," or "departures."

2. The government's second question raises the issue of remedy. It asks, if the Court holds that *Blakely* does apply to the Guidelines:

> [W]hether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

NACDL suggests that because the question contains "four untested assumptions about the appropriate 'remedy,'" it should be replaced with the question: "What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?" NACDL Amici Br. 5.

The NACDL's proposal is unsound. As an initial matter, the open-ended and nebulous character of that question deprives it of the sort of clarity and specificity that is conducive to focused decision making by this Court. A question asking "[w]hat role" various provisions should play at sentencing gives no guidance to the parties, potential amici, or the Court about the specific legal issues that are posed and crystallized for decision. NACDL's question also makes no effort to respond to the particular circumstances of any case. Cf.

Sup. Ct. R. 14.1(a) (requiring a petition to contain "questions presented for review, expressed concisely *in relation to the circumstances of the case*") (emphasis added).

Beyond that, NACDL's "untested assumption" criticism of the government's question is unfounded. First, NACDL supposes that the government's question assumes that "the Guidelines would continue to apply without modification in those cases in which the Guidelines do not call on the judge to decide 'a sentencing-enhancing fact.'" Amici Br. 5. That is indeed the government's position; a defendant should not be permitted to invalidate a statutory and regulatory scheme that in no way infringes *his* constitutional rights. See, *e.g.*, *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004). But the facts of the cases before the Court do not raise that issue. In each of those cases, the Guidelines *did* require the judge to enhance the sentence based on a fact not found by the jury. For that reason, the question presented is properly tailored to the issues raised by the cases at hand. Respondents would be free to urge, and this Court to adopt, a broader remedial theory than the facts require. But the government's question presented is tied to the facts of the actual cases before the Court.

Second, the NACDL argues (Amici Br. 6-7) that the government's question assumes that there is only a "binary" choice as to remedy: either the Guidelines apply as a whole, or they do not. But in answering the government's question, the Court would be free to embrace any of the range of remedial options presented by the facts of the cases. The question presented does not limit

the Court to total acceptance or rejection of the government's proposed remedy.[3]

Finally, NACDL would have the Court expand its review to encompass remedial issues under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, and Federal Rule of Criminal Procedure 32(i). NACDL Amici Br. 8. The short answer to that proposal is that unbounded expansion of the questions in this case to sweep in *all* such remedial issues deprives the Court of more limited questions that are tied to the facts of the cases. More generally, the parties would be free to address, as "fairly included" (Sup. Ct. R. 14.1(a)) in the question presented, the proper severability analysis of the Sentencing Reform Act insofar as it bears on the applicability of the Guidelines. And implications for judicial factfinding under Rule 32(i) will follow logically from this Court's resolution of the questions as framed in the government's petitions.

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[3] NACDL also critiques (Amici Br. 7) the phrase "sentence-enhancing fact" as "a concept of the government's invention," which (it says) is not recognized in the *Apprendi* line of cases. The NACDL would apparently force the parties to limit their vocabulary to "elements" and "sentencing factors." There is no obvious reason why the language of the question presented should be so constrained. See *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (describing jury trial guarantee as applying to "facts essential to imposition of the level of punishment * * * whether the statute calls them elements of the offense, sentencing factors, or Mary Jane"); cf. *Apprendi*, 530 U.S. at 494 (referring to the "novel and elusive distinction between 'elements' and 'sentencing factors'"); *id.* at 494 n.19 (referring to "sentence enhancements" that are the "functional equivalent" of "an element of a greater offense"). If certiorari is granted, NACDL is certainly free to argue against the phrase "sentence-enhancing fact" as used to describe facts that under the Guidelines enhance the sentence.

B. The Petitions In *Booker* and *Fanfan* Provide The Most Suitable Vehicles For This Court's Resolution Of The Questions Presented

Fanfan acknowledges (Br. in Opp. 7) that "[i]t may be true that, in view of the practical importance of obtaining a prompt resolution of the questions presented, prudence counsels in favor of granting certiorari in more than one case, simply to guard against the risk that a barrier to review may arise in any single case." Accord NACDL Amici Br. 8 ("*Amici* submit that it would be appropriate for the Court to grant dual petitions for certiorari"). But Booker, Fanfan, and Amici all have different ideas about which cases are best suited for review. Closely examined, the purported procedural drawbacks of the government's petitions are without merit, and the cases offered as substitutes come equipped with their own problems.

1. There are no procedural impediments to this Court's review in Booker

a. Booker acknowledges (Br. 5) that the Seventh Circuit's decision is an adequate vehicle for addressing the first question presented, but he contends (Br. 6-8) that it is not a good vehicle for reviewing the second, remedial, question, because that issue was not briefed or decided by the court of appeals. In an ordinary case, that point would have merit. Here, it does not. The purely legal issues surrounding what remedy is justified on remand (if the Court were to hold that *Blakely* applies to Guidelines sentencing) have now been adequately illuminated by a plethora of decisions by the district courts and two conflicting decisions of federal courts of appeals.[4] The reasoning in those cases is avail-

[4] Compare *United States* v. *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) (finding the requirement of judicial fact-finding

able to the Court, regardless of the vehicles selected for review. Here, the court of appeals at least applied *Blakely* to the Guidelines and outlined possible options available to the parties and the court on remand. This Court can decide *Booker*, if it concludes that *Blakely* applies to the Guidelines, by explaining which options are legally permissible.

Booker's remaining contention (Br. 8-16) is that, in his view, the government's severability analysis was hastily formulated and is wrong, suggesting that the Court should move more cautiously and await further analysis in the lower courts before granting review. Booker's disagreement with the government is a matter for response at the merits stage of this case; but his suggestion that delay would be beneficial to justice is plainly incorrect. There is already an abundance of legal analysis on *Blakely* issues that outstrips what the Court has available for many issues that it decides. Two courts of appeals have addressed remedy issues (see note 4, *supra*); expedited en banc review is underway in two more. And other courts of appeals may well issue decisions before this Court rules. But above all, awaiting further percolation in the lower courts is not a luxury that the federal criminal justice system can afford. There is a pressing need for this Court immediately to step in and restore uniformity to federal sen-

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under the Guidelines to be severable and applying *Blakely*'s procedures to the determination of sentence-enhancing facts under the Guidelines), with *United States* v. *Mooney*, 2004 WL 1636960 (8th Cir. July 23, 2004) (finding the Guidelines system not to be severable once *Blakely* renders it in part unconstitutional, and requiring sentencing to be conducted as a matter of judicial discretion within the statutory minima and maxima, using the Guidelines as advisory).

tencing—and that need mandates that review be undertaken now, not in the fullness of time.

b. NACDL raises a number of other purported procedural problems with *Booker*. NACDL points out that the defendant there did not preserve a Fifth and Sixth Amendment claim either at trial or on appeal; "instead, the court of appeals raised the issue *sua sponte*." Amici Br. 9. But NACDL fails to note that the Seventh Circuit amended its opinion to state that the government had not raised a claim that Booker forfeited his objection, and thus the court did not consider plain error. *Booker* Pet. App. 26a-27a. The government's petition for certiorari does not present any issue of plain error. And to remove any doubt, the government confirms now that it does not rely on the plain-error doctrine in this case. Cf. *United States* v. *Gaudin*, 515 U.S. 506 (1995) (resolving question whether materiality is a jury issue in a prosecution under 18 U.S.C. 1001); *id.* at 526-527 (Rehnquist, C.J., concurring) (noting that the Court "has no occasion today" to review the court of appeals' rulings that the error was plain and not harmless, because "the Government has not argued here that the error in this case was either harmless or not plain"); see also *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (overlooking the plain-error rule where the Court's failure to decide the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").

Similarly, contrary to NACDL's suggestion (Amici Br. 9), the government does not argue that Booker's statement to the police admitting that he sold the drugs that were the basis for the Guidelines sentence enhancement constituted an "admission" within the meaning of *Blakely*. See *Blakely*, 124 S. Ct. at 2541

(noting that enhancements are not barred if the defendant "either stipulates to the relevant facts or consents to judicial factfinding"). Booker never admitted those facts in a judicial proceeding; instead, at trial, he contradicted his earlier statements. Booker Pet. 3. Nor does the government argue in this case that, by virtue of Booker's statements, any *Blakely* error would be harmless.

c. NACDL also argues against granting certiorari in *both Booker* and *Fanfan* because both arise from drug convictions. Amici Br. 15-18. NACDL offers a convoluted argument that the internal statutory maximum and minimum sentences created by the federal drug statute, 21 U.S.C. 841, create unspecified "complications" that make drug cases "ill-suited vehicles" to decide whether *Blakely* applies to the Sentencing Guidelines. But NACDL offers no explanation of why that is so. The facts show that any such purported statutory issues are wholly irrelevant.

Booker was charged in an indictment with possessing more than 50 grams of cocaine base with intent to distribute it and distributing cocaine base, both in violation of 21 U.S.C. 841(a). *Booker* Pet. App. 31a-32a. The jury found him guilty of that offense. *Id.* at 1a. The statutory sentencing range for drug offenses involving 50 grams or more of cocaine base is ten years to life imprisonment. 21 U.S.C. 841(b)(1)(A)(iii). Thus, the indictment's allegations and the jury's verdict sufficed, as far as Section 841(b) is concerned, to support any Guidelines sentence that Booker could receive, up to and including a sentence of life imprisonment. And Booker clearly received the protection of the constitutional rights described in *Apprendi* on the determination of the relevant threshold drug quantity under Section 841.

The *Blakely* issue arises solely because an offense involving *only* the amount of cocaine base established at trial would translate into a Guidelines range (for a defendant with Booker's criminal history category) of 210-262 months of imprisonment. The district court's consideration of Booker's additional drugs and his obstruction of justice, which were not found by the jury, raised the Guidelines range to 360 months to life imprisonment. Sentencing Guidelines §§ 2D1.1(c)(2), 3C1.1; *id.* Ch. 5, Pt. A (Sentencing Table). Resolution of the constitutionality of that increase in the Guidelines sentence would not require the Court to delve into *any* of "Section 841's ambiguities post-*Blakely*" (NACDL Amici Br. 16). Regardless of how the Court decides the *Blakely* issues under the Guidelines, Booker has no complaint about the process he received to justify his sentence under Section 841.[5]

2. There is ample justification for granting certiorari before judgment in Fanfan

Fanfan argues principally (Br. in Opp. 7-11) that certiorari before judgment is not warranted here because the government has not made the showing required under this Court's Rule 11. He asserts (Br. in

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[5] NACDL adverts (Amici Br. 17) to a purported "significant controversy" over whether drug quantity is *statutorily* defined as an element of an offense. Even assuming that the threshold drug quantities in Section 841(b) were "elements," Booker received all the process that would apply to such "elements" (*i.e.*, indictment, jury trial, and proof beyond a reasonable doubt). The *only* controversy in this case pertains to determinations of drug quantity under the Sentencing Guidelines. NACDL's confused effort to inject into this case irrelevant issues under Section 841 (on which this Court has denied certiorari many times, *e.g.*, *Goodine* v. *United States*, cert. denied, 124 S. Ct. 1600 (2004); note 6, *infra*) provides no basis for declining to grant review in *Booker*.

Opp. 7) that the government has not established why *this* case warrants the "extraordinary step of granting certiorari before judgment." But it is of paramount importance that the issues raised in the case be considered by this Court at the earliest opportunity —and that is an exceptional circumstance that distinguishes this case from the ordinary situation.

a. Fanfan concedes (Br. in Opp. 9) that the Court granted certiorari before judgment in *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989), "[b]ecause of the 'imperative public importance' of the issue * * * and because of the disarray among the Federal District Courts." The issue that was of "imperative public importance" in *Mistretta* is closely related to the issue here: the constitutionality and continued applicability of the Sentencing Guidelines. The disarray among the lower courts here is also comparable to that in *Mistretta*, and the disarray is increasing daily.

Fanfan also argues (Br. in Opp. 9) that "the Court could certainly resolve the questions presented by granting review solely in *Booker*." As respondent also concedes, however, the Court has granted review in other cases before judgment when the case is a "necessary counterpart[] to important cases that themselves reached this Court in the ordinary course." *Ibid.* (citing *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), which was reviewed with *Grutter* v. *Bollinger*, 539 U.S. 306 (2003)). *Fanfan* and *Booker* likewise provide "necessary counterparts" to one another in resolving the urgent questions presented by this case. Indeed, *Fanfan* is the *only* case currently before the Court in which any court has held *Blakely* applicable to the Guidelines and then imposed a remedy for what it perceived to be constitutional flaws in the application of the Guidelines to that case. Granting review in both

Booker and *Fanfan* would also protect against the possibility that any later impediment in one or the other case could prevent timely resolution of the issues.

Finally, Fanfan argues (Br. in Opp. 11) that "this case is not a logical companion to *Booker*—at least no more so than any of the hundreds of cases now pending in the courts of appeals that involve Sixth Amendment challenges to the application of the Sentencing Guidelines." The pendency of "hundreds of cases" raising *Blakely* issues in the brief period since *Blakely* was decided confirms the need for quick resolution of the questions presented in *Booker* and *Fanfan*. And speculation that some other case not on the Court's docket could provide a better vehicle fails to come to grips with the glaring need for expedited consideration of the issues now. Awaiting the filing of petitions in other cases (which may have their own procedural flaws) would be to ignore the urgent need for guidance that the lower federal courts have justifiably requested.

b. Fanfan also suggests (Br. in Opp. 11-12) that there is a "logically antecedent" issue under Section 841 that "may well prevent resolution of the question the petition seeks to bring before this Court." According to Fanfan, that issue is "whether 21 U.S.C. §§ 841 and 846 are themselves unconstitutional because they can be read to establish graduated statutory sentencing levels—antecedent to the Guidelines—in apparent reliance on judicial fact-finding using a preponderance standard." Br. in Opp. 12. That suggestion lacks merit. Fanfan fails to mention that he never raised such a constitutional attack in the district court. Nor has he cross-petitioned in this Court. There is no accepted principle of procedure that would permit him to inject such an issue into the case now. In any event, the lower federal courts have universally rejected any claim that

Section 841 is unconstitutional on the basis asserted, and this Court has repeatedly denied review (as Fanfan himself notes, *ibid.*).[6]

The facts of this case also raise no issue of whether Fanfan's *statutory* sentencing range under Section 841 was established without compliance with the procedures required by *Apprendi* (and *Blakely*). The indictment alleged, and the jury found, the threshold quantity of drugs necessary to establish a statutory punishment ceiling that is well above the highest of the possible Sentencing Guidelines ranges. Fanfan was indicted for conspiracy to distribute and to possess with intent to distribute 500 grams or more of cocaine. *Fanfan* Pet. App. 14a. The jury found him guilty as charged, and specifically found that the amount of cocaine was "500 or more grams." *Id.* at 15a. Under 21 U.S.C. 841(b)(1)(B)(ii), a drug offense involving 500 or more grams of cocaine is punishable by 5 to 40 years of imprisonment. The indictment and jury verdict in Fanfan's case thus authorized a *statutory* sentence of up to 40 years.[7] As is the case with Booker, Fanfan can have no constitutional complaint about the indictment, jury trial, and reasonable doubt procedures that he was accorded in establishing that 40-year ceiling.

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[6] For a partial collection of the legion of cases rejecting the claim and this Court's orders denying certiorari, see U.S. Brief in Opp., at 11 n.8 & 13 n.9, *Gutierrez* v. *United States*, No. 03-8728, 2004 WL 1062088, at *5 nn. 8-9 (May 5, 2004). In *Gutierrez*, this Court once again denied certiorari. 124 S. Ct. 2811 (2004).

[7] The government's petition mistakenly stated that the maximum sentence was life imprisonment under the statute. *Fanfan* Pet. 2. As Fanfan points out (Br. in Opp. 12 & n.12), the government's position in the district court was that the maximum is 40 years. The error in the petition, on which the government gratefully stands corrected by Fanfan, is of no consequence to any legal issue properly presented in this case.

The *Blakely* issue arises only because Fanfan's Sentencing Guidelines range, as the court determined it in light of *Blakely* based solely on the facts found by the jury, was 63-78 months of imprisonment, while his range based on the judge's findings as required by the Guidelines was 188-235 months. *Fanfan* Pet. App. 2a, 6a. Either of those ranges is above the statutory minimum of five years and below the maximum of 40 years that was established by the indictment and jury verdict. There is therefore no constitutional issue in this case surrounding the procedures used to implement Section 841; the only constitutional questions are the ones presented by the petition.

3. The alternative vehicles on this court's docket do not merit plenary review in preference to Booker and Fanfan

In lieu of granting certiorari in *Booker* and *Fanfan*, respondents and the NACDL argue that this Court should grant certiorari in other cases on the Court's docket. Examination of those cases reveals that they are not preferable vehicles for resolving the vitally important issues at stake. Nor should the Court await the filing of other certiorari petitions that raise the same issues (and that also may have serious, if presently unknown, procedural flaws), with the necessary consequence of delay.

a. *Bijou* v. *United States*, *No. 04-5272*. Fanfan (Br. in Opp. 14) and the NACDL (Amici Br. 11) propose *Bijou* v. *United States* as the appropriate vehicle (or companion vehicle) for resolution of the questions presented. In *Bijou*, the Fourth Circuit rendered an unpublished decision rejecting the defendant's *Apprendi* claim before *Blakely* was even decided. Thus, no lower court has examined the implications of *Blakely* for Bijou's Guidelines sentence. In addition, the peti-

tion in *Bijou* presents only a single question concerning the *applicability* of *Blakely* to the Guidelines.[8] The petition raises *no* issue concerning the remedy if *Blakely* does apply to the Guidelines—an issue that all agree is of the utmost importance for this Court to resolve. To surmount that obstacle, NACDL proposes reformulation of the issues in Bijou's petition and states that counsel for Bijou now supports review of those issues. Amici Br. 11 & n.6. There is scant justification, however, for granting review in a case where the petitioner himself has only belatedly decided to adopt amici's formulation of the questions. And, as discussed above, the NACDL's reformulation of the issues is unnecessary and, on the second question, seriously flawed.

NACDL also asserts (Amici Br. 12) that *Bijou* has a "considerable advantage" over the other pending petitions because "it arises from a guilty plea." Yet the NACDL fails to identify how the guilty-plea posture is relevant to the issues. The government would not contend in *Bijou* that, by virtue of Bijou's guilty plea to felon-in-possession charges under 18 U.S.C. 922(g), he waived any rights he may have under *Blakely* to object to his enhanced sentence based on judicial findings about his drug activity. Cf. *Blakely*, 124 S. Ct. at 2535-2536 (noting that Blakely raised his constitutional objection to the increase in his sentence for "deliberate cruelty" after pleading guilty to second-degree kidnapping). Instead, the facts of *Bijou* raise only the same issue presented by the first question in *Booker*, *i.e.*, the constitutionality of sentences enhanced under

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[8] The question presented in *Bijou* states: "Whether a fact necessary for an increase in offense level under the United States Sentencing Guidelines must be alleged and proved according to the requirements of the Sixth Amendment as set forth in *Blakely* v. *Washington*." 04-5272 Pet. at i.

the Guidelines "based on the sentencing judge's determination of a fact not * * * found by the jury or admitted by the defendant." 04-104 Pet. I.

b. *Pineiro* v. *United States*, *No. 04-5263*. NACDL suggests (Amici Br. 10) that in lieu of *Booker*, the Court may wish to grant the petition filed in *Pineiro* v. *United States, supra.* That course is unwarranted. *Pineiro* does involve a court of appeals decision that considered whether *Blakely* applies to the Guidelines. But that feature of the case does not differentiate it from *Booker*. And in *Pineiro*, unlike *Fanfan*, no court formulated or applied a remedy for a perceived *Blakely* problem. Indeed, the *Pineiro* petition presents only a single question, again focusing on *Blakely*'s applicability to the Guidelines.[9] No remedial issue is raised. And there is no indication that the petitioner in *Pineiro* would adopt the (flawed) NACDL formulation of the remedial issue. There is thus no reason for this Court to prefer *Pineiro* over the government's petitions.

C. The Case For Expedited Consideration Is Compelling

As explained more fully in the government's reply in support of its motion for expedited consideration, the federal judicial system is in dire need of this Court's prompt resolution of the issues presented. The defense bar's caution aside—a caution that coincides with the reduced sentences that many defendants are receiving in the current reign of confusion over *Blakely*—there is widespread sentiment in the lower federal judiciary

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[9] The question presented in *Pineiro* states: "Does a federal judge violate a defendant's Sixth Amendment jury trial rights by increasing the defendant's sentence through the application of federal sentencing guideline provisions that are supported by facts found by the judge and not the jury?" 04-5263 Pet. at i.

that, absent this Court's expedited intervention, federal sentencing threatens to descend even further into a balkanized set of regimes in which each circuit, if not each individual district court judge, literally makes up the rules as he or she goes along. This chaotic state of affairs cannot stand. It can only be rectified by expeditious action by this Court.

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For the reasons given above and in the petitions, it is respectfully submitted that the petition for a writ of certiorari in *Booker* and the petition for a writ of certiorari before judgment in *Fanfan* be granted.

Respectfully submitted.

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Acting Solicitor General

JULY 2004